SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Original, No. 17.

THE UNITED STATES OF AMERICA *EX RELATIONE* THEODORE QUEEN, THOMAS S. QUEEN, ANNIE E. STAUFF, SARAH E. HARRY, ROSINA BARNES, EMILY BURROWS, WALLACE C. HARRY, GERTRUDE H. EDWARDS, SAMUEL QUEEN, LOUISA JOHNSON, BURNETTA RILEY, MARY RYE, FRANK QUEEN, CATHERINE DONALDSON, HOWARD QUEEN, NORA COPPERTHITE, MARGARET A. CANNON, BELLE COLLINS, AND MAZIE QUEEN, PETITIONERS,

vs.

RICHARD H. ALVEY, CHIEF JUSTICE; MARTIN F. MORRIS, ASSOCIATE JUSTICE, AND SETH SHEPARD, ASSOCIATE JUSTICE, OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, RESPONDENTS.

PETITION FOR WRIT OF MANDAMUS.

In the Supreme Court of the United States, October Term, 1900.

THE UNITED STATES OF AMERICA *ex Relatione* Theodore Queen, Thomas S. Queen, Annie E. Stauff, Sarah E. Harry, Rosina Barnes, Emily Burrows, Wallace C. Harry, Gertrude H. Edwards, Samuel Queen, Louisa Johnson, Burnetta Riley, Mary Rye, Frank Queen, Catherine Donaldson, Howard Queen, Nora Copperthite, Margaret A. Cannon, Belle Collins, and Mazie Queen, Petitioners,

v.

RICHARD H. ALVEY, Chief Justice; MARTIN F. Morris, Associate Justice, and Seth Shepard, Associate Justice, of the Court of Appeals of the District of Columbia, Respondents.

Original, No. —.

Now come the petitioners and move the court for leave to file the annexed petition for the writ of mandamus, and that a rule may issue upon the respondents therein to show cause why said writ should not be granted to the petitioners.

W. D. DAVIDGE AND
W. D. DAVIDGE, JR.,
Attorneys for Petitioners.

In the Supreme Court of the United States, October Term, 1900.

THE UNITED STATES OF AMERICA *ex Relatione* Theodore Queen, Thomas S. Queen, Annie E. Stauff, Sarah E. Harry, Rosina Barnes, Emily Burrows, Wallace C. Harry, Gertrude H. Edwards, Samuel Queen, Louisa Johnson, Burnetta Riley, Mary Rye, Frank Queen, Catherine Donaldson, Howard Queen, Nora Copperthite, Margaret A. Cannon, Belle Collins, and Mazie Queen, Petitioners,

v.

RICHARD H. ALVEY, Chief Justice; MARTIN F. Morris, Associate Justice, and Seth Shepard, Associate Justice, of the Court of Appeals of the District of Columbia, Respondents.

Original, No. —.

Petition for Writ of Mandamus.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show as follows:

1. They are citizens of the United States and resident in the District of Columbia, and sue in their own right as heirs-at-law and next of kin of one Marcellina Jarboe, deceased, late of the District of Columbia.

2. The respondents are citizens of the United States, resident in the District of Columbia, and hold now, and did hold at the time of the happening of the events hereinafter set forth, the positions respectively of Chief Justice and Associate Justices of the Court of Appeals of the District of Columbia, and the respondents are sued herein in their official capacity as justices of said court.

3. Marcellina Jarboe died in said District on the 28th day of March, 1899, aged eighty-eight years; that she was the widow of one Francis M. Jarboe, but died without issue; and after her death a paper-writing, purporting to be her will, dated February 24, 1892, and two other paper-writings purporting to be codicils, dated respectively October 20, 1892, and February 15, 1898, were offered for probate by William Meyer Lewin, executor, in the supreme court of the District of Columbia, holding a special term for orphans' court business, as her last will and testament. Said applicant was duly appointed collector December 29, 1899, and from his report it appears that the personal estate of the decedent is valued at six thousand four hundred and seventy-seven dollars and twenty cents, and the value of the real property exceeds eight thousand dollars.

4. Your petitioners filed caveats to the probate of said will and codicils, and issues based on said caveats were duly framed presenting the questions of due execution, capacity, undue influence, and fraud, for decision by the jury in respect of each of said paper-writings.

5. In the alignment of parties before the trial of said issues the caveatees were made plaintiffs and your petitioners were made defendants. The said plaintiffs called one subscribing witness to the will and the said codicils respectively, who answered questions relating to the due execution of said paper-writings affirmatively, and thereupon rested their case-in-chief.

6. Your petitioners, as caveators, thereafter offered evidence tending to show that the said Marcellina Jarboe was illiterate, unable to read or write; that one Emily B. Thompson attended to her writing and financial business affairs and had her confidence completely; that the said Marcellina Jarboe was extremely feeble and frequently bedridden; that by her will it was provided in the first clause that her brother, Theodore Queen, one of your petitioners, was—

"To have and to hold in fee-simple unto him, his heirs and assigns, the house and lot upon which I now reside and I also bequeath to him all the household furniture and effects in the same, and I also direct he shall have three thousand dollars out of the sale of my remaining real estate hereinafter directed to be sold."

The said will also provided in the second clause that her "nieces and nephews, children of my brother Alexis Queen, namely, Annie, Rose, Emily, Thomas, Sarah, and Henrietta," have one hundred dollars each. It also provided in the third clause three thousand dollars for the said Emily B. Thompson, and provided that if the said Emily B. Thompson should predecease the said Marcellina Jarboe, then said legacy should be equally divided between her daughters, Ella Thompson and Kate Lloyd. The will also provided in the fourth clause one hundred dollars for Olivia Walker, five

hundred dollars to Georgetown college, four hundred dollars for the Little Sisters of the Poor, two hundred dollars to the pastor of St. Dominick's church, and one hundred dollars to Samuel Bagnam. The will further provided, in the fifth clause, for the public sale of the rest of her realty and taking said legacy to the said Theodore Queen therefrom, and made said Theodore Queen residuary legatee in the seventh clause. It appointed the said Emily B. Thompson and Theodore Queen executors in the sixth clause.

The caveators proved by the testimony of the subscribing witnesses, now surviving, that said will was not read to said Marcellina Jarboe in their presence, and that she was ill in bed at the time of its execution.

7. The codicil, dated October 20, 1892, annuls the first, fifth, sixth, and seventh items of the will of February 24, 1892; revokes the appointment of the said Emily B. Thompson and Theodore Queen as executors thereof, substituting Randall Hagner and Emily B. Thompson, and in place of the annulled clauses of the will of February 24, 1892, provides that:

"I hereby devise and bequeath all my real estate whereever situated and now held by me or hereafter by me acquired, including the house and lot in which I now reside (being No. 416 7th St. southwest in Washington city) and all my personal property including my stocks and bonds and household effects and money in bank unto the said Randall Hagner and said Emily B. Thompson, their heirs and assigns, in trust, nevertheless to sell and good and sufficient deeds thereof in fee-simple to make to any purchaser or purchasers thereof, said purchasers not to be required to see to the application of the purchase-money and out of the proceeds of said sales my trustees are to pay, first, the sum of one thousand ($1,000) dollars in cash to my brother Theodore Queen and next the remaining sums of money set forth as legacies in the said will and not revoked hereby (revocation of the remaining legacies not being intended). My said trustees are then to hold the remainder of said proceeds of said sale and invest the same and is to pay the income thereof quarterly unto my said brother Theodore (after deducting the usual expenses allowed trustees and commissions as allowed by the courts) during the term of the natural life of said Theodore Queen. This is because I fully realize that my said brother Theodore does not understand business methods and would lose or dissipate what I would give him. Upon the death of my said brother the said proceeds of sales are to be paid by my said trustees unto my cousin Emily B. Thompson or in case of her death before mine unto her children Kate E. Lloyd and Ella M. Thompson. The sales to be made by my trustees are to be public sales and I hereby confirm all else in said former will contained and not hereby revoked."

Your petitioners, caveators, proved by the testimony of Smith Thompson, Jr., one of the subscribing witnesses to said codicil, that the same was not read to said Marcellina Jarboe in his presence; also that Emily B. Thompson, named in said codicil, was present during its execution. Caveators also proved by Theodore Queen, brother of said Marcellina Jarboe, that said Emily B. Thompson had taken

his sister earlier in the day in a vehicle from her home to the pla
of execution of the will.

8. The second codicil, dated February 15, 1898, recited the deat
of Randall Hagner and Emily B. Thompson, executors and truste
under the first codicil, and substituted "William Meyer Lewin,
Hyattsville, Maryland, with the same powers, authority and esta
as though he had been originally named as sole trustee and execut
therein." Caveators proved by the testimony of all the subscribin
witnesses thereto, three in number, that this codicil was not read
said Marcellina Jarboe in their presence, and that she was extreme
feeble, and was accompanied to the place of execution by Ella
Thompson, a beneficiary under the said first codicil and the will.

9. The caveators further proved that, in the opinion of George
Holtman, a subscribing witness to the will of February 24, 189
said Marcellina Jarboe in 1898 was not capable of making a leg
document; that Henrietta Harry, one of the legatees, a niece of sa
Marcellina Jarboe, died January 10, 1894; that Francis M. Jarb
died testate May 27, 1891; that Mrs. Jarboe boarded with a M
Byer after the death of her husband and before removing to h
own house, wherein she lived until her death. Caveators also
fered to prove by four witnesses, three of whom were disintereste
that Mrs. Jarboe made a will in 1891, while in Mrs. Byer's hous
that its provisions were different from the will of February 189
that Mrs. Thompson took no part in the preparation of said will
1891 and was not provided for thereby; that subsequently learni
of the existence and contents of said will Mrs. Thompson told M
Jarboe, in the presence of her brother, Theodore Queen, that this w
should not stand, and that she must make a new one, and that th
statement led to the execution of the will of February, 1892. Th
proposed evidence was ruled out by the presiding justice, but su
sequently, in signing a bill of exceptions, he granted a certifica
that such testimony was offered. Caveators further proved by sa
Theodore Queen that Mrs. Thompson said to Mrs. Jarboe in h
presence: "I want my daughters to have what is given me, if
should die before you." Theodore Queen also testified that Emi
B. Thompson died between the dates of the first and second co
cils.

10. At the close of the evidence the caveatees moved the court
instruct the jury to render a verdict in favor of the will and each
the said codicils respectively, which said motion was granted by th
court and which the jury did, and the caveators, by their couns
duly excepted to said ruling of the court while the jury was still
the bar of the court, and said exception was entered upon the mi
utes of the presiding justice, and on the 30th day of June, 1900, th
trial justice signed a bill of exceptions, from which the above stat
ment is extracted. A copy of said bill of exceptions, containing a
the evidence, is herewith filed, marked Exhibit A, and prayed to
taken as part hereof.

11. May 2, 1900, a motion for a new trial was filed, and on Ma
10, 1900, said motion was overruled and an order passed admittin
said will and codicils to probate, directing letters testamentary

issue, and allowing an appeal to the Court of Appeals of the District of Columbia, and fixing the bond for costs on said appeal, not to operate as a supersedeas. On May 17, 1900, said bond was duly approved and filed.

12. The act of Congress approved February 9, 1893, entitled "An act to establish a Court of Appeals for the District of Columbia and for other purposes," establishing the Court of Appeals of the District of Columbia, provides, section 7 (unaffected in this particular by the amendatory act of Congress approved July 30, 1894, entitled "An act to amend sections four, six, and ten of the act of February ninth, eighteen hundred and ninety-three, entitled 'An act to establish a Court of Appeals for the District of Columbia and for other purposes'"):

"That any party aggrieved by any final order, judgment, or decree of the supreme court of the District of Columbia, or of any justice thereof, may appeal therefrom to the Court of Appeals hereby created; and upon such appeal the Court of Appeals shall review such order, judgment, or decree and affirm, reverse, or modify the same as shall be just."

Section 6 of said act creating the Court of Appeals of the District of Columbia, as amended by the act approved July 30, 1894, provides:

"That said Court of Appeals shall establish by rule of court such terms in the court in each year as to it may seem necessary: Provided, however, that there shall be at least three terms in each year, and it shall make such rules and regulations as may be necessary and proper for the transaction of its business and the taking of appeals to said court. And said Court of Appeals shall have power to prescribe what part or parts of the proceedings in the court below shall constitute the record on appeal and the form of bills of exception, and to require that the original papers shall be sent to it instead of copies thereof, and generally to regulate all matters relating to appeals whether in the court below or in said Court of Appeals."

13. Under the power to make rules the Court of Appeals of the District of Columbia has adopted the following rule, No. XV of the rules of that court as revised to April 1, 1899, this being the only rule of that court relative to the time for filing the transcript of the record: "All cases, the records or transcripts of which shall be received by the clerk of this court before the last twenty days of the term, shall be considered for trial in the course of that term; but such cases shall be placed on the docket in the order of time in which the records or transcripts shall be received; and if received within twenty days of the next succeeding term, either party shall be entitled to a continuance; but when an appeal is entered in the court below which shall operate as a supersedeas of the judgment, order, or decree appealed from, or when there has been a special order or appeal bond for the stay or supersedeas of the judgment, decree, or order appealed from, in all such cases it shall be the duty of the appellant, within forty days from the time of the appeal entered and perfected in the court below (unless such time for special and sufficient cause be extended by the court below, or the judge

thereof by whom the judgment, decree, or order, may have
rendered, such time to be definite and fixed), to produce and
with the clerk of this court a transcript of the record of such ca
and if he shall fail to file the transcript within the time lim
therefor the appellee shall be allowed to file a copy or transcri
the record with the clerk of this court, and the cause shall stan
trial in the like manner as if the transcript had been filed by
appellant in due time; or the said appellee may, on producir
certificate from the clerk of the court below, stating the cause,
that an appeal has been entered, and the date thereof, and that
judgment, decree, or order appealed from is stayed or supersede
bond or otherwise, have the said appeal docketed and dismis
or, *in any and all cases*, the appellee may, after the time limited
filing the transcript in this court by the appellant, and his or
default in respect thereto, upon producing a certificate showing
entry of appeal and the date thereof, have said appeal docketed
dismissed; and in no case shall the appellant be entitled to dock
case and file the record after said appeal shall have been dock
and dismissed under this rule, unless by special order of the c
upon satisfactory reason shown."

14. The appeal from the order admitting to probate the will
codicils was duly taken and allowed on May 10, 1900, and perfe
May 17, 1900, by filing a bond for costs, duly approved by the c
July 2, 1900, the trial justice signed an order extending the tim
filing the transcript forty days from the expiration of the t
previously limited. July 18, 1900, your petitioners, caveators,
a motion in the orphans' court to charge the costs of the ap
upon the estate, supporting it by an affidavit showing the pov
of the caveators. This motion was personally served on a mem
of a firm of attorneys who represented the caveatees. He was n
town on the return day of the motion. The executor named in
second codicil, himself an able lawyer, was requested to respon
the motion. He requested counsel for the caveators to writ
Charles L. Frailey, Esquire, then at Long Island, New Yor
member of said firm of attorneys, in reference to said motion.
was done, and in reply thereto Mr. Frailey sent the following le
filed in said Court of Appeals:

"EAST HAMPTON, L. I., N. Y., *July* 31, 190

"J. H. Adriaans, Esq., Wash'n, D. C.

"DEAR SIR: Your favor of the 25th inst. at hand. You w
greatly oblige me by waiting until my return to Wash., about
15, before calling up your motion in the matter of taxing costs,
I cannot consent to the order you propose, and would like t
heard on the motion. I do not think the delay will amount to
thing or really postpone the hearing of the case in the Cou
Appeals appreciably.

"Yours very truly,

"(Signed) CHARLES L. FRAILEY

When counsel on both sides finally returned the presiding justice was unable to hear the motion, owing to an engagement. Meanwhile the time for filing the transcript, limited by the order of July 2, 1900, had expired, and caveators thereupon filed a motion now for then to extend further the time for filing said transcript, and thereupon the justice before whom the cause had been tried granted the motion and further extended the time for filing the transcript until October 15, 1900.

15. The said transcript was filed and docketed on October 9, 1900, at about 9.30 a. m., before the meeting of said Court of Appeals. The caveatees had previously served a notice on your petitioners of a motion to docket and dismiss the appeal under rule 14 (evidently meaning rule XV) of said court for failure to file the transcript of record. Said motion was to be heard October 9, 1900, at ten o'clock a. m. Said notice was never docketed in the said Court of Appeals, but the original notice served on counsel for your petitioners is herewith filed, marked Exhibit B, and prayed to be taken as part hereof. When said motion came on to be heard, the transcript having been filed as aforesaid, counsel for caveatees in open court abandoned said motion to docket and dismiss and stated to the court that he would file a motion to dismiss said appeal. The court thereupon allowed said motion to be filed, and ordered that briefs be filed by the respective parties within six days thereafter. Subsequently, on same day, counsel for caveatees filed the following motion and notice of motion:

In the Court of Appeals of the District of Columbia.

THEODORE QUEEN ET AL., Appellees,
vs.
WILLIAM MEYER LEWIN, Executor, *et al.*, Appellees. } No. 1023.

Now comes the appellees, by their counsel, and move the court to dismiss the appeal in the above-entitled cause for failure to file the transcript of record within the time allowed by rule fourteen of this court, as extended by order of the court below on the second day of July, 1900.

(Signed) A. S. WORTHINGTON,
(Signed) CHAS. L. FRAILEY,
Attorneys for Appellees.

Messrs. Davidge and Davidge, attorneys for appellants.

GENTLEMEN: Please take notice that we shall call up the above motion before the Court of Appeals on Friday, the 12th day of October, 1900, at ten o'clock a. m., or as soon thereafter as counsel can be heard.

(Signed) A. S. WORTHINGTON,
(Signed) CHAS. L. FRAILEY,
Attorneys for Appellees.

The briefs referred to were duly filed within the time limited.

16. October 19, 1900, the said Court of Appeals passed the follow ing order as a mandate for transmission to the supreme court of th District of Columbia:

"Court of Appeals of the District of Columbia, October Term, 190

"THEODORE QUEEN, EMILY BURROWS, THOMAS S. Queen, *et al.*, Appellants,
"*vs.*
"WILLIAM MEYER LEWIN, Executor; KATE LLOYD, Ella Thompson, *et al.*
No. 1023.

"Appeal from the supreme court of the District of Columbia.

"This cause came on to be heard on the transcript of the recor from the supreme court of the District of Columbia, and on a mo tion to dismiss, which was argued by counsel.

"On consideration whereof it is now here ordered and adjudge by this court that this appeal be, and the same is hereby, dismisse with costs.

"Per MR. CHIEF JUSTICE ALVEY.

"October 19, 1900."

17. The order of the supreme court of the District of Columbi admitting said will and codicils to probate and record was a fina order, and your petitioners were thereby aggrieved. Your peti tioners' appeal did not operate as a supersedeas, and was filed an docketed within the time limited by the supreme court of the Dis trict of Columbia in the order of extension. The order of that cour provided that the transcript should be filed on or before October 1 and it was filed October 9, 1900, before a motion to docket and dis miss could be heard. Petitioners moreover state that the remedy for a breach of rule XV of said Court of Appeals is a motion t docket and dismiss and no other remedy. In petitioners' case th motion to docket and dismiss was after service abandoned becaus the transcript had been filed and docketed before said motion coul be heard. In lieu thereof a motion to dismiss was filed after the ap peal had been docketed, the stated ground of the motion being th failure to file the transcript within the time limited by the rul u der consideration, and the order of the respondents, dated Octobe 19, 1900, is expressly based on the latter motion. By the unwar ranted action of the respondents in dismissing the appeal of you petitioners, the time within which to take another appeal from th order admitting said will and codicils to probate having expired, a provided for by rule X of the said Court of Appeals, not only are th petitioners deprived of a hearing in said Court of Appeals, but also i this court.

Wherefore, the premises considered, your petitioners pray:

1. That the alternative writ of mandamus may issue from this honorable court, directed to Richard H. Alvey, chief justice; Martin F. Morris, associate justice, and Seth Shepard, associate justice, of the Court of Appeals of the District of Columbia, commanding them to show cause, by a day therein named, why they should not reinstate said appeal and hear and determine the same on its merits.

2. That upon the return to said writ, after hearing, the same may be made peremptory and the said respondents ordered forthwith to reinstate said appeal and to hear and determine the same on its merits.

3. That the petitioners may have such other and further relief as to the court may seem meet.

THOMAS S. QUEEN.
MARY RYE.
her
ROSINA x BARNES.
mark.
THEODORE QUEEN.
her
ANNIE E. x STAUFF.
mark.
her
EMILY x BURROWS.
mark.
SARAH E. HARRY.
WALLACE C. HARRY.
GERTRUDE H. EDWARDS.
SAMUEL QUEEN.

W. D. DAVIDGE AND
W. D. DAVIDGE, JR.,
Attorneys for Petitioners.

CHARLES W. STETSON,
Witness as to marks of Rosina Barnes, Emily Burrows, Annie E. Stauff.

The above verbal alterations were made before execution.
CHARLES W. STETSON.

DISTRICT OF COLUMBIA, *ss:*

We do solemnly swear that we have read the petition by us subscribed and know the contents thereof, and that the facts therein stated upon our personal knowledge are true, and those stated upon information and belief we believe to be true.

THOMAS S. QUEEN.
MARY RYE.
her
EMILY x BURROWS.
mark.
her
ROSINA x BARNES.
mark.
THEODORE QUEEN.
her
ANNIE E. x STAUF.
mark.
SARAH E. HARRY.
WALLACE C. HARRY.

CHARLES W. STETSON,
Witness as to marks of Emily Burrows, Rosina Barnes, Annie E. Stauff.

Subscribed and sworn to before me this 20th day of December, 1900.

[Seal of Charles W. Stetson, Notary Public, District of Columbia.]

CHARLES W. STETSON,
Notary Public.

Resworn to before me on the 21st day of December, 1900, as to the alterations made, as follows:

Page 4, line 31, after the word "legatee," the words "in the seventh clause" inserted.

Line 32, after the word "executors," the words "in the sixth clause" inserted.

Page 5, at the end of paragraph 7, after the word "execution," the words "of the will" inserted.

Page 7, line 10, after the word "exceptions," the words "containing all the evidence" inserted.

Page 10, line 22, the word "appellant" changed to "appellees."

[Seal of Charles W. Stetson, Notary Public, District of Columbia.]

CHARLES W. STETSON,
Notary Public.

EXHIBIT B.

thington, Heald & Frailey, Columbian Building, 416 5th street N. W., telephone No. 274.

. Worthington, Rooms 613 to 616.
n C. Heald,
rles L. Frailey. WASHINGTON, D. C., *Oct.* 4, 1900.

In the Court of Appeals of the District of Columbia.

e Estate of MARCELLINA JARBOE, Deceased. No. 8851, Adm. Doc. 25 (Below).

rs. Davidge & Davidge, of counsel for caveators, city.

ENTLEMEN: Please take notice that on Tuesday next, October 1900, at 10 o'clock a. m., or as soon thereafter as counsel can be d, we shall move the said Court of Appeals to docket and dis- the appeal in the above-entitled cause, under rule 14 of said t, for failure to file the transcript of record in said cause.

A. S. WORTHINGTON,
CHARLES L. FRAILEY,
Attorneys for Caveatees.

EXHIBIT A.

In the Supreme Court of the District of Columbia.

e Estate of Marcellina Jarboe, Deceased. No. 8851, Adm. Doc. 25.

Bill of Exceptions.

e it remembered that the above-entitled cause came on for trial n the issues framed therein, before Mr. Justice Cole and a jury, on 30th day of April, 1900, and thereupon and after said jury had been anelled and sworn, the caveatees, to maintain the issues on their joined, produced as a witness GEORGE J. HOLTMAN, who testified the testatrix, Marcellina Jarboe, on the 24th day of February, , signed by her mark the will in controversy as her will, and he, the witness, signed his name as a witness to said will, at her est, in her presence, and in the presence of the other witnesses to will.

hereupon one SMITH THOMPSON, JR., testified that he was pres- when the first codicil to said above-mentioned will was ex- ed, on October 20th, 1892, and was a witness thereto, and that testatrix executed said codicil in the presence of the witness, who ed as a witness at her request, and the other witnesses to said cil, who subscribed their names as witnesses at her request.

hereupon one ARTHUR M. BEAN testified he was present when the testatrix, Marcellina Jarboe, executed her second codicil to said

will, on the 15th day of February, 1898, and that she executed the same in his presence and in the presence of the witnesses who's names appear on the attesting clause of said codicil.

And thereupon the plaintiffs, caveatees, rested.

Thereupon the caveators, defendants, to maintain the issues on their part joined, produced as a witness ARTHUR M. BEAN, who testified in substance that at the time of the execution of said second codicil of February 15th, 1898, he was sent for to sign as a witness to what he supposed was a will; that before he signed as a witness the paper was read over to testatrix by Mr. Lewin, the lawyer who was present; that the testatrix then went over to a table and made her mark. On cross-examination witness said that testatrix frequently came to his store to see about fixing her glasses, as witness is a jeweller, and that he never saw anything prior to the execution of the last codicil to indicate that she was of unsound mind.

Thereupon Dr. C. S. PRICE was produced as a witness for the caveators, who testified that he was a witness to the last codicil of February 15th, 1898; that Mr. Lewin was present and explained the paper to all the witnesses, and then the testatrix, Marcellina Jarboe, was asked to sign; that she was quite feeble and was led to the table, and witness signed her name and she touched the pen; that Mr. Lewin, Mrs. Jarboe, Miss Thompson, and Mrs. Price were present. Mrs. Price was a friend; Mr. Lewin was the lawyer who prepared the codicil.

Thereupon the will and the respective codicils thereto were read to the jury by counsel for the caveators, and said will and codicils are in the words and figures following, to wit:

Will.

"I, Marcellina Jarboe, sometimes called Marcella Jarboe, of the city of Washington, in the District of Columbia, being of sound and disposing mind, memory and understanding, do hereby make and publish the following as and for my last will and testament hereby revoking all former wills made by me:

"1st. Item 1st. I hereby give and devise unto my brother Theodore Queen, to have and to hold in fee-simple unto him his heirs and assigns, the house and lot upon which I now reside and I also bequeath to him all the household furniture and effects in the same, and I also direct that he shall have three thousand dollars out of the sale of my remaining real estate hereinafter directed to be sold

"2nd. Item 2nd. I bequeath unto my nieces and nephews children of my brother Alexis Queen, namely Annie, Rose, Emily, Thomas, Sarah and Henrietta the sum of one hundred dollars ($100.00) each.

"3rd. Item 3rd. I bequeath to Emily B. Thompson the sum of three thousand dollars ($3,000.00) and in case she should die before me I wish and direct that said amount of three thousand dollars

($3,000.00) be divided equally between her two daughters namely Kate Lloyd and Ella Thompson.

"4th. Item 4th. To Olivia Walker (formerly Olivia Bowen) and her daughter Jessie Bowen, I bequeath one hundred dollars ($100.00) each. And to Georgetown college the sum of five hundred dollars ($500.00). And to the Little Sisters of the Poor the sum of four hundred dollars ($400.00). To the pastor of St. Dominick's church, I bequeath two hundred dollars ($200.00) and to my God-son Samuel Bagman one hundred dollars ($100.00).

"5th Item 5th. I devise all the rest of my real estate unto my executors hereinafter named to be sold and out of the proceeds of sale, I direct them to pay the sum of three thousand ($3,000.00) dollars named in the first item hereof unto my brother Theodore Queen. The sale herein provided for shall be a public sale.

"6th. Item 6th. I hereby appoint my brother Theodore Queen and Emily B. Thompson as executors of this my will.

"7th. All the rest and residue of my estate I give, devise and bequeath unto my brother Theodore Queen.

"In testimony whereof I have hereunto set my hand and seal this 24th day of February, A. D., 1892.

her
MARCELLINA x JARBOE. [SEAL.]
mark.

"Signed, sealed, published, and declared by Marcellina Jarboe, the above-named testatrix, as and for her last will and testament in the presence of us, who at here request and in her presence and in the presence of each other have subscribed our names as witnesses thereto this 24th day of February, A. D. 1892.

GEO. J. BUTT,
420 *7th St. S. W.*
GEO J. HOLTMAN,
427 *7th St. S. W.*
SAM'L L. KELLY,
426 *7th St. S. W.*
RANDALL HAGNER,
406 *5th St. N. W.*"

First Codicil.

"I, Marcellina Jarboe, sometimes called Marcella Jarboe, do hereby make and publish the following as and for a codicil to the above and annexed will by me heretofore made:

"I do hereby revoke and annul the devises and bequests contained in the 1st (first) 5th (fifth) 6th (sixth) and 7th (seventh) items of the annexed will and hereby revoke and annul the appointment of my brother Theodore Queen and my cousin Emily B. Thompson as my executors of said will and in their stead I hereby appoint and constitute Randall Hagner and said Emily B. Thompson of Washington, D. C., the executors and trustees of and under this my last will and testament.

"In the place and stead of the above-named clauses which I have

revoked I hereby devise and bequeath all my real estate wherever situated and now held by me or hereafter by me acquired, including the house and lot in which I now reside (being No. 416 7th St., southwest in Washington city) and all my personal property including my stocks and bonds and household effects and money in bank unto the said Randall Hagner and said Emily B. Thompson, their heirs and assigns, in trust, nevertheless to sell and good and sufficient deeds thereof in fee-simple to make to any purchaser or purchasers thereof, said purchaser not to be required to see to the application of the purchase-money and out of the proceeds of said sales my trustees are to pay, first, the sum of one thousand dollars ($1,000.00) in cash to my brother Theodore Queen and next the remaining sums of money set forth as legacies in the said will and not revoked hereby (revocation of the remaining legacies not being intended). My said trustees are then to hold the remainder of said proceeds of said sale and invest the same and *is* to pay the income thereof quarterly unto my said brother Theodore (after deducting the usual expenses allowed trustees and commissions as allowed by the courts) during the term of the natural life of said Theodore Queen. This is because I fully realize that my said brother Theodore does not understand business methods and would lose or dissipate what I would give him.

"Upon the death of my said brother the said proceeds of sales are to be paid by my said trustees unto my cousin Emily B. Thompson or in case of her death before mine unto her children Kate E. Lloyd and Ella M. Thompson.

"The sales to be made by my trustees are to be public sales and I hereby confirm all else in said former will contained and not hereby revoked.

"In testimony whereof I hereby set my hand and seal this 20th day of October, A. D. 1892.

her
MARCELLINA x JARBOE. [SEAL.]
mark.

"Signed, sealed, published, and declared by Marcellina Jarboe as and for a codicil to her last will and testament and taken as part thereof in the presence of us, who at her request and in her presence have subscribed our names as witnesses thereto this 20th day of October, A. D. 1892.

"The name of Emily B. Thompson being inserted wherever the name of Randall Hagner stated herein with him as executor and trustee before our signing as witnesses.

SMITH THOMPSON, JR.,
1529 29*th St.*
CECILIA H. DAVIES,
1322 11*th St. S. W.*
FRANK DE M. EVANS,
1020 8*th St. N. W.*"

Second Codicil.

"This is the second codicil of the last will and testament of me, Marcellina Jarboe, sometimes called Marcella Jarboe, which said will is hereto annexed and which is dated the 24th day of February, 1892, and the first codicil to which said will is hereunto annexed and dated the 20th day of October, A. D. 1892, wherein Randall Hagner and Emily B. Thompson were by said first codicil appointed executors and trustees of and under said will and first codicil, and have since died, now, therefore, it is my will that William Meyer Lewin, of Hyattsville, Maryland, shall be substituted in the place of said Randall Hagner and Emily B. Thompson with the same powers, authority and estate as though he had been originally named as sole trustee and executor therein.

"In all other respects I confirm the first codicil.

"In testimony whereof I have hereunto subscribed my name and affixed my seal this fifteenth (15th) day of February, A. D. eighteen hundred and ninety-eight (1898).

her
MARCELLINA x JARBOE. [SEAL.]
mark.

"Signed, sealed, published, and declared by Marcellina Jarboe, sometimes called Marcella Jarboe, as and for the second codicil to her last will and testament in the presence of us, who at her request and in here presence and in the presence of each other have subscribed our names as witness- thereto this 15th day of February, 1898.

GEO. E. CROSSWELL,
431 *7th St. S. W.*
A. M. BEAN,
435 *7th St. S. W.*
CHAS. S. PRICE,
426 *7th St. S. W.*"

A true copy of the will and two codicils of Marcellina Jarboe, deceased.

April 4th, 1899.
Test: J. NOTE McGILL,
[SEAL.] *Register of Wills, D. C.*

Thereupon the caveators produced as a witness Dr. C. V. BOARMAN, who testified that he knew Mrs. Jarboe, the testatrix, many years ago; that the last time he went to her house was about twenty-five years ago, and that he does not remember whether he has ever since seen her, and that he had never made an effort to see her, and that here physical condition when he last saw her was excellent.

Thereupon Mrs. C. V. BOARMAN, wife of the above witness, testified that she had known Mrs. Jarboe ever since she was married, about fifteen years: that she had seen her about once or twice a week during the last five years, and visited her because she, testatrix, was not

able to come out on account of rheumatism, though not always bed; that the witness saw Mrs. Jarboe the last time about two or th days prior to her death, and at that time she was asleep; that knew Mrs. Jarboe in February, 1892, and visited her once or tw a year, and that she saw Mrs. Emily B. Thompson and Miss E Thompson there two or three times. Witness further stated t Mrs. Jarboe's condition in 1892 was about the same as in all th years up to her last illness; she was not a woman of education, told me that Mrs. Thompson and Miss Keller attended to her bu ness; also her lawyer, Mr. Hagner. She could talk all right and as good as any person of her age as witness ever saw. Witness ne heard her say anything on the subject of her will; that Mrs. Jar never mentioned Mrs. Thompson at all; that Mrs. Jarboe died March 28th, 1899. On cross-examination witness stated that th was nothing wrong with Mrs. Jarboe mentally.

Thereupon caveators produced as a witness GEORGE J. BUTT, w knew Mrs. Jarboe and had at one time a store on the Jarboe prope Witness testified that he did not remember about Mrs. Jarboe maki a will, but identified his signature as a witness to will of February, 18 and that her condition, both mentally and physically, was good in 18 as well as when witness first knew her. On cross-examination w ness stated that Marcellina Jarboe seemed to him as sound menta as any one, and that he saw and knew her up to two or three ye before her death, and that her mental condition was the same up the time he last saw her. Witness further stated that he did know Miss Thompson.

Thereupon caveators produced GEORGE J. HOLTMAN, who testifi that at the time of the execution of the will of 1892, of which was a witness, some one said to testatrix, "What are you doing?" a she said, "I am making my last will and testament," and then made a mark in the presence of the witnesses; that as to her con tion physically, she was very ill in bed, but witness thought she w mentally all right; that she was capable of making a will at t time; that he was there about fifteen minutes; that witness qu tioned her because he would not have signed if he had thought t testatrix was insane. Witness further stated that he thought s was capable of making a will. Witness did not remember wheth it was read or talked over. She was very feeble afterwards, and little eccentric. Witness stated that during the last two or th years of her life he would see said Marcellina Jarboe in her fr yard doing nothing particular, but that he had no talk with her business matters; that she was close in business matters, but t during the last two or three years he would only talk to her ab her health, and she said she felt bad; that in 1898, from these fa he thought she was not capable of making a legal document, b was capable of sending for her lawyer. Witness further testifi that he never knew she had any relatives except Theodore Que and that he never saw any relatives nor heard of any of them.

Thereupon the caveators produced as a witness Dr SAMUEL KELLY, who testified that he was a subscribing witness to the will of Marcellina Jarboe of February, 1892, and was present when the will was executed, and that at the time the testatrix was asked if it was her will, and that she answered, "It was;" that there were present on that occasion Lawyer Hagner, George J. Butt, George J. Holtman, and witness. Witness could not remember whether will was read or not. Witness further testified that the physical condition of testatrix was poor, but as to her mental condition he thought her capable of making a will; that he kept a drug store then and occupied the store almost next to where the testatrix lived and frequently compounded prescriptions for testatrix.

On cross-examination the witness said that testatrix was sharp at money matters and could take care of herself in any money matters, and that he would not have signed as a witness to her will if she had not been all right. Witness said also that he never heard of any relatives of Mrs. Jarboe except Theodore Queen.

Thereupon the caveators produced as a witness SMITH THOMPSON, JR., who stated that he was present when the first codicil to the will of February, 1892, was executed, on October 20th, 1892, and that he signed as a witness thereto, and that there were present Randall Hagner, the lawyer; Mrs. Jarboe, Mrs. Emily B. Thompson, Miss Davies, Miss Evans, and himself; that he signed as a witness to said codicil at the request of said Marcellina Jarboe, who said it was a codicil to her will and asked the witness to be a subscribing witness to it, and that this was done in the register of wills' office, where the witness was then employed. Witness further testified that in his opinion the testatrix, Marcellina Jarboe, was rational and capable of making a valid deed or contract; that he recognized the handwriting of Randall Hagner as a witness to said codicil, and that Mr. Hagner, who died prior to the making of the last codicil, was in as good standing as any member of the bar. Said codicil was not read to Mrs. Jarboe in presence of witness.

Thereupon caveators produced as a witness THEODORE QUEEN, who testified that he was a brother of said Marcellina Jarboe. Witness then proceeded to give evidence tending to establish the pedigree of the caveators and their relationship to the testatrix, including the fact that Henrietta Harry, a legatee, died January 10th, 1894. Witness then testified that Mr. Jarboe died May 27th, 1891; that after his death Mrs. Jarboe boarded first with a Mrs. Blackson and then with Mrs. Byer, where she staid three or four months. She then went to her own house; that her condition physically was that of a liability to nervous prostration at times, when body and mind would be weak for a week or ten days; that her mind was weak, in his opinion, early in 1892; that moderate spells of this would come often, but bad spells seldom; that he was in the house when the will was made, living with her; that Mrs. Thompson made one or two visits to Mrs. Jarboe's house prior to the making of Mrs. Jarboe's will, but witness did not overhear the conversation;

that when the will was made Lawyer Hagner came in in the mo
ing and Mrs. Emily B. Thompson was there; that the testa
was dictating to Mrs. Thompson how the will was to be ma
that she said to Mrs. Thompson, "Are you satisfied with the $3,00
I have given you?" and Mrs. Thompson said, "Yes, Cousin Ma
and I thank you, too." Thereupon Mr. Hagner said, "Will th
be estate enough to pay all the legacies?" and then Mrs. Thomp
said, "Make up any deficiency out of what is given to me;" and
also said, "I want my daughters to have what is given to me,
should die before you;" that at the time of the execution of the
it was not read to the testatrix; that at the time of the execution
the first codicil, in October, 1892, Mrs. Thompson came and sai
her, "I want you to go and appoint another executor." She h
tated, and Mrs. Thompson said, "Your nieces are going to con
the will, and I do not want to be executrix," and thereafter testat
went in a vehicle with Mrs. Thompson to Lawyer Hagner's off
and after she came home testatrix said, "Now they can all g
sleep." Witness further testified that just before she was taken s
and after the execution of the last codicil the testatrix said to h
"I don't like the last two wills I have made. If I get my m
fixed up I may make another will, but if I do not make anot
one, you must try to get along the best you can." Witness
tified that he was not in the house at the time of the exe
tion of the second codicil and knew nothing about it. W
ness never heard Mrs. Thompson say anything to said M
cellina Jarboe about a will before Mrs. Jarboe made the
on February, 1892; that when the will was made Mrs. Jar
told Mrs. Thompson, and Mrs. Thompson made a note of w
she said. Witness heard Marcellina Jarboe say, "I want my nie
and nephews to get $100.00 each, and Theodore, $3,000.00, the ho
and effects absolutely, and you, $3,000.00." The nephews and nie
are those which are in the will. Witness also stated that Marcell
Jarboe told Mrs. Thompson that she wanted the legatees (wh
names are in the will) to get what the will gave them. Witn
testified also that Mrs. Thompson simply made a note of th
things. Witness testified that Mrs. Thompson died between
date of the two codicils, and thereafter her two daughters cal
frequently, but witness overheard no conversation. Witness furt
testified that said Marcellina Jarboe, the testatrix, dictated her wis
to Mrs. Thompson, as aforesaid, and left the house and effects to hi
the witness. Witness then considered her of sound mind, at
time of the making and execution of the will of 1892. Testat
would simply speak of the Thompsons.

Caveators thereupon produced as a witness Mrs. ANNIE BAGN
who testified that she knew Mrs. Jarboe nineteen years; that M
Jarboe boarded with them in 1891, and that she was able to atte
to her business at that time and knew exactly what she wanted a
how she wanted it done.

On cross-examination she said she knew Mrs. Jarboe down to
time of her death, and knew her intimately nineteen years; that

thought she was of sound mind during the whole of said time, and that she saw her sometimes as often as once or twice a week.

Thereupon JAMES BYER was called as a witness for the caveators, who testified that Mrs. Jarboe had lived with them in 1891 for four or five months, and that he had never heard anything about the making of a will.

Thereupon the caveators called Mrs. GEORGE PUMPHREY, who testified that she lived for two years prior to Mrs. Jarboe's death near her and would see her every day during these two years; that her physical condition was feeble and sickly, but that she did not think the testatrix was crazy; that she would talk all right and talk about her aches and pains.

Thereupon the caveators produced as a witness Mrs. SARAH E. HARRY, one of the caveators, who testified that she was a niece of the testatrix and saw her two or three times a year; that at the time of the death of Mrs. Jarboe, in 1891, Mrs. Jarboe complained that she felt bad, but witness did not think her mind was affected; that she knew nothing about any will, but saw Miss Thompson at Mrs. Jarboe's during the week she died.

Thereupon Miss BELLE SMITH was produced as a witness for the caveators, who testified that she did not know Mrs. Jarboe, but was at her house with her aunt, Mrs. Copperthite, about a year and one-half ago, and that on that occasion heard Mrs. Jarboe say that they would not be forgotten; that she would remember Wallace, meaning Wallace Harry, but did not want him to know it then.

Thereupon the caveators recalled Dr. C. S. PRICE, who further testified that he knew the testatrix from 1882 until the time of her death; that he saw her occasionally up to 1890; that her physical condition was good; that he then was away for four years and saw — more of the testatrix from 1894; that he noticed she had failed very much and was failing right along, and that her health failed every month; that he was her druggist and prescribed for her, and that her condition during the last year was very feeble; that at the time of the execution of the last codicil witness did not think she was capable of executing an instrument where money or other property was involved, and that during the last year of her life she was incompetent. On cross-examination the witness testified that he did not think she was crazy, and that he thought she knew what she was doing when she executed the last codicil and was competent to select an executor.

Thereupon the caveators produced as a witness Mr. GEORGE E. CROSSWELL, who testified that he was slightly acquainted with Mrs. Jarboe and had known her for about two years prior to her death, during which time she was very feeble; that he would have slight

conversations with her, and that she was complaining about health; that he remembered being called upon to witness the cution of the last codicil, in 1898, at which time the testat physical condition was feeble. Witness further testified that al knew about her was that she was feeble, but he could not state her mental condition was; that he did not think she had said a half a dozen words to him.

Thereupon the caveators offered in evidence the death certif of the said testatrix, Marcellina Jarboe; which said certificate the words and figures following:

Transcript No. 1593. Record No. 124,3(

HEALTH DEPARTMENT, DISTRICT OF COLUMBIA,
WASHINGTON, *June* 26, 19(

A Transcript from the Record of Deaths in the District of Columb

Name of deceased: Marcellina Jarboe.
Date of death: March 28, 1899.
Age of deceased: 88 years.
Color, sex, social condition, and occupation: White, female, wi not stated.
How long a resident in District of Columbia: 80 years.
Cause of death: Lobar pneumonitis and gastritis, senile debi exhaustion.
Birthplace: Maryland.
Duration of last sickness: Three minutes.
Place of burial: Holyrood cemetery.
Place of death: No. 416 Seventh street southwest.
Undertaker: Joseph Gawler.
Medical attendant: G. R. Lee Cole, M. D.

A true copy.
[SEAL.] WM. C. WOODWARD, M. D.,
Health Officer and Regist

Attest: H. C. McLEAN, *Chief Clerk.*

Correct.
WM. B. MOORE, *Statistician.*
S. P.

Thereupon the caveators rested, and this was all the evidenc the case.

Thereupon the caveatees moved the court to instruct the jur render a verdict on the issues in favor of the will and each of said codicils respectively; which said motion was granted by court, and the jury were instructed by the court to answer the second, fifth, sixth, ninth, and tenth issues in the affirmative,

the third, fourth, seventh, eighth, eleventh, and twelfth issues in the negative, and the jury so answered said issues, as aforesaid, and the caveators, by their counsel, duly excepted to said ruling of the court while the jury was still at the bar of the court, and said exception was entered upon the minutes of the presiding justice, and the caveators pray the court to sign this their bill of exceptions, and it is done accordingly this 30th day of June, A. D. 1900, now for then.

(Signed) CHAS. C. COLE, [SEAL.]
Asso. Justice.

No. 17 Orig.

FILED
FEB 23 1901
JAMES H. McKENNEY,
Clerk.

Brf. of Davidge & Davidge for Rel.

Filed Feb. 23, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Original, No. 17.

THE UNITED STATES OF AMERICA EX RELATIONE THEODORE QUEEN ET AL., PETITIONERS,

vs.

RICHARD H. ALVEY, CHIEF JUSTICE; MARTIN F. MORRIS AND SETH SHEPARD, ASSOCIATE JUSTICES OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

RELATORS' BRIEF.

W. D. DAVIDGE AND
W. D. DAVIDGE, JR.,
Attorneys for Relators.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 2-21-'01

Supreme Court of the United States.

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RICHARD H. ALVEY, CHIEF JUSTICE; MARTIN F. MORRIS AND SETH SHEPARD, ASSOCIATE JUSTICES OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

RELATORS' BRIEF.

THE CASE.

The relators were caveators and defendants in a cause instituted in the Supreme Court of the District of Columbia under the act of Congress approved June 8, 1898, conferring on said court jurisdiction to take proof of the execution of wills affecting real estate. The suit was instituted to establish an alleged will and two codicils thereto of Marcellina Jarboe, deceased. The cause was tried before Mr. Justice Cole and a jury, the issues being, in respect of each

paper, execution, capacity, undue influence, and fraud. At the trial the justice took the case from the jury and directed a verdict on each issue for the caveatees, which was accordingly rendered. The relators excepted, and a bill of exceptions was duly settled (Petition, 1–4).

On May 10, 1900, a motion for a new trial was overruled, and on the same day an order was passed admitting the will and codicils to probate and allowing an appeal to the Court of Appeals of the District of Columbia, and fixing the amount of the appeal bond which was for costs only, and did not operate as a supersedeas; and on May 17, 1900, the required bond was duly approved by the court and filed, thus perfecting the appeal (Petition, 4, 5).

The rule of court regulating the filing of transcripts in the Court of Appeals in the special class of cases to which it refers is set out in full in the petition at pages 5 and 6. It requires that where the appeal operates as a supersedeas or stay of execution that the transcript shall be filed within forty days from the time of the appeal entered and perfected "unless such time for special and sufficient cause be extended by the court below or the judge thereof by whom the judgment, decree or order may have been rendered, such time to be definite and fixed."

On July 2, 1900, the trial justice extended the time for filing the transcript forty days from the expiration of the time then limited. The transcript, however, was not filed within the extended time, and, on motion, Mr. Justice Cole again extended the time to October 15, 1900 (Petition, 7).

The transcript was filed on October 9, 1900. The appellees had given notice of a motion to docket and dismiss under Rule XIV, evidently meaning thereby Rule XV,

of the Court of Appeals, but when this motion came on to be heard, the transcript having then been filed, the motion was abandoned by counsel in open court, and, with the leave of the court, a motion to dismiss was substituted, under which the Court of Appeals, on October 19, 1900, dismissed the appeal with costs (Petition, 7, 8).

Thereupon the relators, being without other remedy, with leave of the court first had and obtained, filed their petition here for the writ of mandamus requiring the Court of Appeals to hear and determine the cause on its merits.

In due time the respondents answered. The specific ground on which the Court of Appeals refused to hear and determine the cause of the relators is not set forth in the return. The prominence, however, given to the discussion of the *default in filing the record* would naturally lead to the inference that such default was, pursuant to the provisions of Rule XV of the Court of Appeals, the ground of the action of the court in dismissing the appeal, while near the close of the return, at page 10, it is said that the court had no jurisdiction to entertain the appeal, no power to hear and determine, thus leading to the inference that the ground of the dismissal was the *want of such jurisdiction*. There is, however, as stated above, no distinct averment of the ground upon which the court acted, but that subject is left solely to inference. We hope to show that neither ground has any existence, and that the dismissal is wholly indefensible.

In considering this matter we shall follow the order above indicated, taking up first the question of the effect of the default under the rule, and then the question of the jurisdiction of the Court of Appeals to entertain the appeal.

POINTS.

A.

The default in filing the transcript of record, as required by Rule XV of the respondents.

1.

At the time the motion to dismiss was made the record had actually been filed.

The rule is set out in full at page 5 of the petition and partially in the answer of the respondents. It has not the slightest bearing upon the cause of the relators, which was not an appeal operating, in the words of the rule, "as a supersedeas of the judgment, decree, or order appealed from" or where "there had been a special order or appeal bond for the stay or supersedeas of the judgment, decree, or order appealed from." The cause of the relators involved no stay or supersedeas in any form. The bond given and approved was simply a bond for costs, and the appeal by the relators left their opponents as free to act as if it had never been taken.

The utter want of application of the rule to the cause dismissed will be discussed hereafter, but for the present, conceding, *argumenti gratia*, such application, it would furnish no ground for the dismissal because of the simple and uncontradicted fact that when the motion to dismiss was made the transcript was in the hands of the court. The court actually had the record when the motion to docket and dismiss came up for hearing and was abandoned and before the motion to dismiss was even filed (Petition, 7). The very

order of dismissal states that "this cause came on to be heard *on the transcript of the record* from the Supreme Court of the District of Columbia, and on a motion to dismiss." Thus the ludicrous spectacle is presented of a court with the record before it dismissing a cause because it did not have the record before it. Any one would suppose that if the court held the transcript for the purpose of refusing the legal right to a hearing, it held it also for the purpose of granting such right.

The rule now under consideration is so much like Rule IX of this court that it must have been taken from the latter. There are some points of difference, which will be noticed later, but for the purposes of this part of the argument the two rules are very similar. This court in construing this rule has uniformly held that, like any other default, the transcript may be filed at any time after the expiration of the time limited by the rule, but during the life of the writ of error or appeal, provided the appellee or defendant in error has not availed himself of his right to docket and dismiss.

Said the court in Evans *vs.* State Bank:

"Under the ninth rule, it is the duty of an appellant to docket his case and file the record with the clerk of this court within the first six days of the term, where the decree was rendered thirty days before the commencement of the term, and if this is not done, the appellee may have the case docketed and dismissed as therein provided; though even then the court may by order permit the appellant to docket the case and file the record after such dismissal. And it has always been held that if the case is not so docketed and dismissed by the appellee, the appellant is in time if the record be filed during the return term."

Evans *vs.* State Bank, 134 U. S., 330, 331.

Again:

"The transcript of the record may be filed at any day during the term succeeding the taking of an appeal or the bringing of a writ of error, if appellee or defendant in error has not in the meantime had the cause docketed and dismissed."

Green *vs.* Elbert, 137 U. S., 615, 621.

See, also—

Bingham *vs.* Morris, 7 Cranch, 99.
Owings *vs.* Tiernan, 10 Pet., 24.

2.

The motion acted on by the court itself shows that the dismissal was not under the rule.

The rule creates a duty and prescribes a remedy for nonfulfillment. That remedy is two fold. The appellee may file the transcript and have the case heard or he may file a motion to docket and dismiss. No such motion was made. The petition avers and it is conceded that notice of such a motion was given, but that after the transcript had been filed that motion was abandoned and a motion to dismiss substituted. If the appellees claimed any rights under the rule they were bound to assert them by a motion to docket and dismiss, as provided by the rule. The purpose of the motion to docket and dismiss is to require the appellant to file the transcript or submit to having his appeal dismissed. The motion to dismiss, however, is quite a different remedy and applicable to another class of cases. The motion to dismiss goes to the merits of the case or to some imperfection in the

record itself, and Rule XVI of the Court of Appeals expressly distinguishes this motion from the motion to docket and dismiss, requiring the notice of the former to be given at least two days before the case is liable to be called for *argument.*

Moreover, however the motion to dismiss may be regarded, there was no attempt to comply with the requirements of Rule XV by filing the clerk's certificate without which an appeal will not be docketed and dismissed.

West *vs.* Brashear, 12 Pet., 101.

3.

The time was properly extended by the trial justice in conformity with the rule.

The language of the rule is explicit, "unless such time for special and sufficient cause be extended by the court below, or the judge thereof by whom the judgment, decree, or order may have been rendered." The manifest object of this provision was to prevent the sacrifice of the right of appeal where there was reasonable excuse for delay. To effect this object the power of extension was in the court or judge below, as most likely to know whether, under the circumstances, further time should be granted. There is nothing in the provision to confine the discretion of the court or judge below to one extension—much less to require that if there should be a second extension the motion therefor should be made before the expiration of the prior extension. The rule is silent on these subjects, leaving them to the discretion of the court or judge

exercising the power, differing from the rule of this court, which requires the extension to be made before the expiration of the formerly limited time. The power is a continuing one. The reasons for a second extension might well be more potent than for a first extension, and so with a motion made after instead of before the expiration of a prior extension. It is not pretended that the cause was not special and sufficient, and it is submitted that that question was by the rule left to the discretion of the trial justice who signed the order.

It was urged in argument below that the power to grant a second extension would or might involve the power to postpone the hearing of the appeal indefinitely. This objection might have some force were it not for the very simple fact that every appeal is returnable to the succeeding term, and at the end of that term is *functus officio*. It has then, in the language of Green *vs.* Elbert, *supra*, "spent its force." This objection is, therefore, wholly devoid of merit.

But even assuming that Mr. Justice Cole had no power to grant the extension, that did not authorize the dismissal of the appeal. The want of power on the part of the justice below at the utmost left the relators in default in respect of filing the transcript under the rule, and such default was cured by the filing of the transcript before the cause was dismissed.

Office Supreme Court U. S.
FILED
FEB 27 1901
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Original, No. 17.

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vs.

RICHARD H. ALVEY, CHIEF JUSTICE; MARTIN F MORRIS AND SETH SHEPARD, ASSOCIATE JUSTICES OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Extract from the Rules of the Court of Appeals of the District of Columbia.

To be inserted at page 8 of the relators' brief.

"No. I.

"TERMS OF COURT.

"1. There shall be three terms a year, the same to commence on the first Tuesday of October, the first Tuesday after the first day of January, and the first Tuesday of April in each year, and all process of said court shall be returnable on the first day of the term succeeding the date of the issue

of such process, unless otherwise specially ordered by the court.

"2. All appeals shall be taken with reference to said terms, as prescribed in the preceding clause of this rule, and all cases thus brought into this court shall be placed upon the dockets thereof in the order of time in which the transcript shall be received by the clerk of this court, to be placed upon the dockets of the court for hearing in regular order."

"No. X.

"TIME AND MANNER OF ALLOWING APPEALS TO THIS COURT.

"1. No order, judgment, or decree of the supreme court of the District of Columbia, or of any justice thereof, shall be reviewed by the Court of Appeals, unless the appeal shall be taken within twenty days after the order, judgment, or decree complained of shall have been made or pronounced."

4.

The rule in question did not apply to the cause of the relators.

We now come to the discussion of the rule itself. As already stated, it is confined in terms to cases of supersedeas or stay, and in respect of such cases imposes on the appellant the duty of filing the transcript within the prescribed period of forty days. But the cause of the relators was not of the class of cases to which the rule relates, but was neither in letter nor spirit within the rule. Such being the case, we ask what rule or authority imposed upon the relators the duty of filing the transcript within the forty days prescribed by the rule? This is the crucial question to be answered by the respondents. They say the duty so to file is not found in the part of the rule devoted to the subject of the duty and imposing it in cases of supersedeas and stay, but lower down the rule says "*or*" (note the disjunctive) "*in any and all cases the appellee may after the time limited for filing the record in this court by the appellant and his or her default in respect thereto, upon producing a certificate* * * * have said appeal docketed and dismissed." Now, certainly, this part of the rule creates no new duty. It does not enlarge in any manner the cases specified in the former part of the rule and to which the duty of filing within forty days is confined. It does not, however remotely, countenance the idea that an appellant in a cause in which there was no supersedeas or stay should be under the same obligation as to filing as if there were such supersedeas or stay. No possible construction of the above-quoted words can make them impose a duty where none had been imposed before. If such duty

is or can be asserted, it must be the result of interpolation or main strength, and not of construction.

The meaning of the above-quoted provision, it is submitted, is perfectly obvious without the exercise of amendatory power making a new rule. The first few lines of the rule relate to the docketing of transcripts at the return term. The rule then makes special provision for the filing of transcripts in cases of supersedeas and stay. It further provides for the exercise of the power of extension by the court and judges below, whereby new periods, definite and fixed, were to be limited when proper. Having done this, it proceeds to provide for the enforcement of the duty to file the transcript. It declares in respect of cases of supersedeas and stay that upon default to file within forty days the appellee may file the transcript and have the cause heard or may, upon production of the required certificate, have an order to docket and dismiss. Had the rule stopped here it is plain that many cases would have been left unprovided for. There would have been no provision for appeals not involving a supersedeas or stay, nor for cases where new periods had been limited by the court and judges below in the exercise of their power to extend, nor for cases where the appeal had been spent by reason of failure to file the transcript at the succeeding term. Hence the general provision above quoted, that in *any and all cases* the appellee may, after the time limited and the default of the appellant, have the cause docketed and dismissed. This broad language means limited by lawful authority, and includes all cases, as well cases where the time is limited by the rule as cases where time is otherwise limited.

It is not easy to see how this provision of the rule in

any way helps the case of the respondents, for the provision in plain words declares that the predicate of the right to docket and dismiss shall be the default of the appellant to file the transcript *within the time limited.* Now, it is asked when and by what authority was the time limited as respects the case of the relators? Certainly not by Rule XV, which is confined to cases of supersedeas or stay, and it is conceded that there is no other rule. Then by what authority was any limit imposed? There can be but one answer, and that is, that the Court of Appeals is a court of terms, and that the end of the term succeeding the appeal is the limit prescribed for filing the transcript. Of course, a shorter period might have been prescribed, but such is not the case, and unless this be done the appellant is entitled to the whole succeeding term.

Green *vs.* Elbert, 137 U. S., 615.

Evans *vs.* State Bank, 134 U. S., 330.

The answer of the respondents states, at pages 6 and 7, that when the rule was originally adopted and when it was amended in 1894, it was the intention of the respondents in all cases "to fix a period of time within which the record should be filed in the Court of Appeals (subject to the authority given by the rule itself to the court below or a judge thereof to extend the time), *otherwise there would have been no provision at all* for cases in which there should be no supersedeas." Entertaining, as we do, the profoundest respect and esteem for the respondents, we assume that the intention existed as alleged, but we respectfully submit that such intention could in no wise add to the rule as promulgated or impose upon the re-

lators a duty conceded not to be declared by the rule as it stood and which, as has been shown, is not fairly imported by the terms of the amendment. The rights of the relators could not be affected by undisclosed intentions, and the answer does not attempt to show by what process a duty not existing before the amendment can be evolved from its terms.

Certainly all must admit that among the acknowledged qualities of the respondents as able jurists cannot be classed a very happy faculty of expression.

In conclusion of this point we deem it proper to call the attention of the court to the case of the District of Columbia *vs.* Humphries, 11 App. D. C., 68, cited in the return of the respondents. The most cursory examination of that case will show that it is not in point for the reason that it was a case of supersedeas. It was an appeal by the District of Columbia, which of itself, without bond, operates as a supersedeas.

"No such appeal, except in cases where the United States or the District of Columbia is appellant, shall operate as a stay of execution or supersedeas unless within such term of twenty days the appellant shall file in the clerk's office of the Supreme Court of the District of Columbia a bond, with surety or sureties, to be approved by one of the justices of said court, conditioned for the successful prosecution of such appeal."

Rule X, section 2, Court of Appeals.

See also Rule 80, Supreme Court of the District of Columbia.

Even if that case were as supposed by the return, it is submitted that it would furnish no authority for a second offense against the plain words of the rule.

B.

The Court of Appeals had jurisdiction to hear and determine the cause of the relators, and its refusal so to do was illegal.

By the seventh section of the act of February 9, 1893, creating the Court of Appeals, it is enacted "that any party aggrieved by any final order, judgment, or decree of the Supreme Court of the District of Columbia, or of any justice thereof, may appeal therefrom to the Court of Appeals hereby created, and upon such appeal the Court of Appeals shall review such order, judgment, or decree and affirm, reverse, or modify the same as shall be just."

It will be observed that the right of appeal is absolute and the correlative duty of the court also absolute.

Section 10 of the same act provides "that the opinion of the said Court of Appeals shall *in every case* be rendered in writing and shall be filed in such case as a part of the record thereof."

Now here was a case directly within the right of appeal given and the duty of the court to hear and determine, summarily dismissed without previous notice save for default under the rule, and without any opinion, as required by law; and yet if there was no jurisdiction, it was right to dismiss—indeed, the court could not have acted otherwise. At the same time, however, as the court held the motion for six days, it is only fair to presume that any want of jurisdiction, however occult, would in that time have been discovered and made known, as the law required, in an opinion or, at least, in the order of dismissal. It is evident that no such discovery was made, and, indeed, in the return the

want of jurisdiction is not averred, as above stated, as the ground of the dismissal.

The return, at page 10, says:

"In conclusion the respondents respectfully submit that the order referred to in the petition in this case, which was made by a judge in the court below on the 21st day of September, 1900, *was of no effect, and that they were without jurisdiction to entertain said appeal and were compelled to grant the motion that was made to dismiss it.*"

This is the only part of the return asserting want of jurisdiction, and even in it it is to be observed that the respondents do not say in terms that in consequence of the order referred to there was a want of jurisdiction, or that the order "compelled" the dismissal.

A word or two as to the order. Let it be supposed it was of no effect and void. The consequence could only be that the relators would have been deprived of the excuse for delay which would have been afforded by the order if effectual. In other words, they would have been in default for not filing the transcript within the time limited by the prior order of Mr. Justice Cole. Such default would have brought them within Rule XV, and the cause might have been docketed and dismissed under that rule. But how about jurisdiction? That would not in any manner be affected. Indeed, the rule itself on its face contemplates the continuance of jurisdiction by providing that, notwithstanding docketing and dismissal, the court may, upon satisfactory reason, allow the case to be docketed and the record filed. Of course, this could not be done if the effect of the default was, *ipso facto*, to take away jurisdiction,

as now intimated. By what law or rule or other authority, it is asked, was the jurisdiction of the Court of Appeals to try and determine the cause in any manner affected by the order? The jurisdiction of the court depends on the law; and, even if it depended on the court, that tribunal has done nothing to indicate that jurisdiction shall be taken away and the court "compelled" to refuse to try and determine a cause because a justice, acting in good faith, has made an order which it is assumed is beyond his power. To refuse to try and determine on any such ground seems practically to *abandon* the jurisdiction conferred by law, and, worse than that, to *punish* innocent parties because in the past their former attorney, misled by the rule, has committed the sin of moving for an order which a justice in good faith and fully aware of all the circumstances has thought it proper to grant.

Respectfully submitted.

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